

United States Department of the Interior
Office of Hearings and Appeals
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HOOPA VALLEY TRIBE)	DOCKET NO. IBIA 00-41-A
Appellant)	
)	RECOMMENDED DECISION
vs.)	
)	
NORTHERN AREA MANAGER, BUREAU		
OF RECLAMATION)	
Appellee)	

This case arises under the Indian Self-Determination and Educational Assistance Act, as amended (hereinafter, ISDEA). See 25 U.S.C. §§ 450-450n (1994). It originated when the Hoopa Valley Tribe (hereinafter, Tribe), pursuant to 25 C.F.R. § 900.158, filed its Notice of Appeal with the Interior Board of Indian Appeals on February 22, 2000. Administrative Record (hereinafter, AR) p 00005.¹ The Tribe characterizes its appeal as an appeal of the recommended decision issued by the Office of the Secretary on January 21, 2000. (AR pp 00006, 00009; See 25 C.F.R. 900.156(a)). However, it is clear that the Tribe is primarily appealing the November Tribe’s proposal to contract under the ISDEA for certain activities related to “management of the Trinity River fish, wildlife and water resources.”² AR p 00091 (BOR decision); AR p 00141 (Tribe’s proposal).

BOR has submitted an Administrative Record. In accordance with an informal briefing schedule, the Tribe submitted its Statement of Reasons, BOR submitted its Response to the Statement of Reasons, and the Tribe filed a Reply brief. Briefing was completed on July 13th, 2000. The parties have agreed that no hearing would be held and that this forum’s

¹ The term “Administrative Record,” as used in this decision, means the Administrative Record certified by Michael J. Ryan on April 5, 2000, which has been filed with this forum and is contained in a three-ring binder. This forum recognizes that a supplement to the Administrative Record has also been filed, although the supplement is not cited in this decision.

² The applicable regulation, at 25 C.F.R. § 900.158, refers only to appeals of the “initial decision,” which in this case would be the BOR decision. See 25 C.F.R. 900.158(c)(1). However, an appeal of the initial decision prevents a recommended decision issued after an informal conference from becoming final. See 25 C.F.R. § 900.157.

Recommended Decision would be based on the Administrative Record and the briefs. See Summary of Status Conference, January 12, 2001, p 1.

Having reviewed and considered the Administrative Record and the briefs, this forum recommends that BOR's declination of the Tribe's contract proposal be affirmed in part and reversed in part, as set forth below.

PROCEDURAL HISTORY

The Tribe's Proposal

The Tribe filed its proposed ISDEA contract on August 18, 1999. AR p 00141. The Tribe proposes to contract for fifteen activities "planned to be carried out by [BOR] regarding management of the Trinity River fish, wildlife and water resources in Fiscal Year 2000." AR p 00141. These activities include the following: Trinity River Program Technical Support and Comprehensive Fishery Co-Management; Trinity Flow Study EIS Joint-Lead Participation; several activities aimed at studying fish, such as Chinook Scale Age Determination; several activities aimed at studying or improving fish habitat, such as Pilot Channel Rehabilitation; and Comprehensive Fisheries Management, in which the Tribe participates in what are described as "technical advisory" and "management" bodies. AR pp 00151-52. The funding proposed for each activity ranges from \$26,000 to \$256,000, and the total proposed funding for all fifteen activities is approximately \$1.1 million.

BOR's Declination

BOR declined the Tribe's proposal on November 5, 1999. AR p 00091. BOR's rationale was that the activities proposed by the Tribe were all "national conservation programs designed to benefit all members of the public." AR p 00091. BOR acknowledged that the Tribe would benefit from "Reclamation's management activities related to the Trinity River," but asserted that "these projects are designed to increase fish, wildlife, and water resources for the benefit of all American people- not just the Hoopa Valley Tribe." AR p 00091. Therefore, BOR asserted, the activities proposed by the Tribe were not "for the benefit of Indians because of their status as Indians," and did not fall within the range of activities which could be the subject of an ISDEA contract. AR p 00091; See 25 U.S.C. § 450f(a)(1)(E). BOR cited 25 U.S.C. § 450f(a)(2)(E) as authority for its declination.

Informal Conference and Recommended Decision of the Secretary's Representative

Pursuant to 25 C.F.R. 900.154, the Tribe requested an informal conference on December 3, 1999. AR p 00087. The Secretary designated Christopher Kinney, Director, Office of Native American Affairs, Bureau of Reclamation, Washington, D.C., as his representative. AR p 00078; 25 C.F.R. § 900.155(c). Mr. Kinney conducted the informal conference on January 11, 2000. AR p 00009. Danny Jordan represented the Tribe, and John C. Bezdek, Esq., represented BOR. AR p 00010. Each party presented its position at the conference. AR pp 00013-17.

Mr. Kinney prepared a combined summary of the informal conference and recommended decision and mailed this to the Tribe on February 22, 2000. AR p 00005; See 25 C.F.R. § 900.156(a). After discussing the statutes which provide authority for the activities proposed by the Tribe, Mr. Kinney stated: “Because the Trinity River fishery restoration is for the benefit of all user groups and is not solely for the benefit of Indians because of their status as Indians, the Tribe’s proposal fails to pass the threshold test for contractibility as set forth in 25 U.S.C. § 450f(a)(1)(E).” AR p 00018. Therefore, Mr. Kinney concluded, BOR properly declined the Tribe’s proposal. As set forth above, the Tribe then filed the instant appeal. Supra pp 1-2.

BACKGROUND

The Tribe’s Fishing Rights

The background and history of the Tribe’s fishing rights are well set out in a Solicitor’s Opinion entitled “Fishing Rights of the Yurok and Hoopa Valley Tribes,” as well as in the Tribe’s Statement of Reasons. AR pp 00217-276; Statement of Reasons of the Hoopa Valley Tribe (hereinafter, “SOR”). A brief summary follows.

The lower 12 miles of the Trinity River, which is over 100 miles long, flows through the Tribe’s Hoopa Valley Reservation before discharging into the Klamath River. AR pp 00229-30, 00013. The Klamath and Trinity Rivers provide habitat for runs of salmon and other anadromous fish. AR p 000230.

The Tribe has historically been heavily dependent on salmon that spawn in the Trinity River. AR pp 00234-38. Salmon provided a dietary staple for the Tribe, and were valuable for trade and, later, for sale. AR p 00237. That dependence continues today. SOR p 6, quoting *United States v. Wilson*, 611 F. Supp. 813, 818 n. 5 (N.D. Cal. 1985), *rev’d on other grounds sub nom. United States v. Eberhardt*, 789 F.2d 1354 (9thCir. 1986).

The Tribe has federally reserved fishing rights³ associated with its reservation which have long been recognized by the courts. AR pp 00238-242. As determined by the Solicitor, the Hoopa and Yurok⁴ Tribes are entitled to “a sufficient quantity of fish to support a moderate standard of living, or 50% of the Klamath fishery harvest in any given year, whichever is less.”

³ The Solicitor’s Opinion defines a federally reserved fishing right as “not one of ownership of particular fish, but a right to an opportunity to obtain possession of a portion of the resource, which can best be expressed by either the numbers of fish taken or an allocation of the harvestable resource.” AR p 00240 (citations omitted).

⁴ The Yurok Tribe has a reservation on the Klamath River, downstream from the Hoopa Valley Reservation (as set forth above, the Trinity River discharges into the Klamath River just below the Hoopa Valley Reservation).

AR p 00253. Because the fishing rights are held by the United States in trust for the Tribe, the United States is responsible for protecting and rebuilding the fishery so that the Tribe's fishing rights may be utilized to their fullest extent. AR pp 00254-55.

The Tribe points out that fishery populations began to decline after construction of the Trinity River Division⁵ in 1963. SOR p 8. This decline led to federally-imposed restrictions on the Tribe's exercise of its fishing rights. AR p 00030; See 25 C.F.R. Part 250 (1996).

BOR's Trinity River Restoration Programs

The Trinity River Division Act (TRDA), Pub. L. 84-386, which authorized the construction of the Trinity River Division, was enacted in 1955. 69 Stat. 719. In Section 2 of the TRDA, Congress authorized and directed the Secretary to "adopt appropriate measures to insure the preservation and propagation of fish and wildlife." 69 Stat. 719. The record does not reflect what actions BOR took in response to this statutory directive, other than what are described by Mr. Kinney as "informal efforts" towards the restoration of the Trinity River fishery before 1984. AR p 00017.

Congress passed the Trinity River Basin Fish and Wildlife Management Act (TRFWA) in 1984, which it described as "[a]n Act to provide for the restoration of the fish and wildlife in the Trinity River Basin." 98 Stat. 2721. In Section 1 of the TRFWA, Congress found that construction of the Trinity River Division had contributed to a "drastic reduction in the anadromous fish populations . . ." TRFWA, Sec. 1(1); 98 Stat. 2721. Congress therefore required the Secretary of the Interior (hereinafter, Secretary) to "formulate and implement a fish and wildlife management program for the Trinity River Basin designed to restore the fish and wildlife populations in such basin to the levels approximating those which existed immediately before [construction of the Trinity River Division]." TRFWA, Sec. 2(a); 98 Stat. 2722. Congress also established an advisory group to assist the Secretary in formulating and implementing the fish and wildlife management program. TRFWA Secs. 3, 2(b)(1); 98 Stat. 2722-23. The group as originally established consisted of fourteen members from various federal, state, local and tribal governmental entities, including one member to be appointed by the Hoopa Valley Tribe. TRFWA Sec. 3(a); 98 Stat. 2722-23. Finally, Congress appropriated approximately \$35 million dollars for the design, construction, and operation of the fish and wildlife management program and for related activities, which was to remain available until October 1, 1995. TRFWA Sec. 4(a); 98 Stat. 2723-24.

⁵ The Trinity River Division is part of the Central Valley Project. Its primary purpose is to transfer water from the Klamath River Basin (which includes the Trinity River) to the Sacramento River Basin. It consists of a number of dams, lakes, powerplants, tunnels, and other, related facilities. 69 Stat. 719; See Eric Stene, Central Valley Project, Trinity River Division (Fifth Draft), pp 1-2 (1994) (found at <http://dataweb.usbr.gov/html/trinityh.htm>).

In 1996, Congress amended the TRFWA through the Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1995. 110 Stat. 1338. Among a number of changes, Congress made three which are relevant here. First, Congress extended the appropriation through October 31, 1998. 110 Stat. 1340. Second, Congress added five members to the advisory group, including representatives from the Yurok and Karuk Tribes, representatives of commercial and sports fishing interests, and a representative from the timber industry. 110 Stat. 1339. Third, Congress added the following language to the TRFWA: “Trinity Basin fisheries restoration is to be measured not only by returning adult anadromous fish spawners, but by the ability of dependent tribal, commercial, and sport fisheries to participate fully, through enhanced in-river and ocean harvest opportunities, in the benefits of restoration.” 110 Stat. 1338.

According to Mr. Kinney, funding for the TRFWA expired, presumably on October 1, 1998. AR p 00017. He further states: “The statute which carries the restoration work forward is the Central Valley Project Improvement Act (CVPIA).” AR p 00017. Section 3406(b)(23) of the CVPIA provides for an instream release of not less than 340,000 acre-feet per year of water in the Trinity River “in order to meet Federal trust responsibilities to protect the fishery resource of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the [TRFWA].” 106 Stat. 4600, 4720. That Section also requires the Secretary to complete, after consultation with the Tribe, a “Trinity River Flow Evaluation Study” with the goal of developing recommendations “regarding permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River Fishery.” 106 Stat. 4720. The Secretary was then required to forward these recommendations to Congress. 106 Stat. 4721. If the Secretary and the Tribe concurred in the recommendations, the Act authorized the implementation of those recommendations. 106 Stat. 4721. If the Secretary and the Tribe did not concur in the recommendations, then the 340,000 acre-feet per year minimum instream release would remain in effect. According to the Tribe, the Trinity River Flow Study was completed in June of 1999, and it recommends that releases be increased. SOR p 8.

The appropriations bill for BOR for fiscal year 2000 contains a general appropriation for “Water and Related Resources” of \$607,927,000. This money was expressly appropriated for:

[M]anagement, development, and restoration of water and related natural resources and for related activities, including the operation, maintenance and rehabilitation of reclamation and other facilities, participation in fulfilling related Federal responsibilities to Native Americans, and related grants to, and cooperative and other agreements with, State and local governments, Indian tribes, and others . . .

Pub. L. No. 106-60, 113 Stat. 483, 488. The bill contains a more specific appropriation for the “Central Valley Project Restoration Fund” of \$42,000,000. This money was in turn expressly appropriated for “carrying out the programs, projects, plans, and habitat restoration, improvement, and acquisition provisions of the [CVPIA] . . .” 113 Stat. at 489.

The Tribe's Participation in BOR's Trinity River Recovery Programs

The Tribe states that it has “participated extensively in the Trinity restoration effort since its inception.” SOR p 8. It was a co-lead in the preparation of a recent Draft Environmental Impact Statement relating to restoration of the Trinity River fishery, and has monitored recreational fishing in parts of the Trinity River. SOR p 8. The Tribe goes on to state: “Because of its ongoing active participation in the Trinity restoration effort, the Tribe was already performing many of the activities, programs, and functions for which it proposed to contract.” SOR p 8. This was done through a cooperative agreement with BOR. AR p 00143.

BOR provides further information concerning the Tribe's participation, stating that the Tribe and BOR have been working together since 1992. Federal Appellee's Response to Appellant's Statement of Reasons (hereinafter, “BOR Response”) p 1. Joint projects have usually been undertaken through cooperative agreements. BOR Response pp 1-2. In 1999, the Tribe and BOR “began negotiating a Self Governance Annual Funding Agreement pursuant to Title IV of Public Law 93-638 for Fiscal Year 2000.”⁶ BOR Response pp 1-2; AR p 00212. However, the parties were unable to reach agreement over “termination for cause” language. BOR Response p 2; AR p 00180. This is apparently what led the Tribe to file the ISDEA contract proposal at issue here. Reply of the Hoopa Valley Tribe in Support of Its Statement of Reasons (hereinafter, “Tribe's Reply”) pp 8-9.

ISSUE PRESENTED

The parties agree that the sole issue to be decided in this matter is whether the activities in the Tribe's proposal constitute “programs or portions thereof . . . for the benefit of Indians because of their status as Indians.” BOR Response, p 4; Tribe's Reply p 2; See 25 U.S.C. § 450f(a)(1)(E). If they do, then the proposed activities fall within the scope of Title I of the ISDEA, and BOR lacks any basis to decline the Tribe's proposal. See 25 U.S.C. § 450f(a)(1)(E). If they do not, then BOR properly declined the Tribe's proposal.

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⁶ Title IV of Public Law 93-638, as amended, provides for the establishment and operation of a Tribal Self-Governance program. 25 U.S.C. 458aa et seq. Under this program, the Secretary is authorized to enter into annual funding agreements with authorized Tribes to enable those Tribes to carry out certain Departmental “programs, services, functions, and activities, or portions thereof” (hereinafter, “PFSAs”) 25 U.S.C. 458cc(b). These PFSAs can include those which are of “special geographic, historical, or cultural significance” to a Tribe. 25 U.S.C. § 458cc(c). The Secretary has more discretion with regard to the initiation and implementation of a Title IV funding agreement than she does with regard to the initiation and implementation of an ISDEA (Title I) contract. Compare 25 U.S.C. § 458cc with 25 U.S.C. § 450f.

THE PARTIES' ARGUMENTS

In its Statement of Reasons, the Tribe argues that Congress clearly “authorized the programs, functions, services, and activities related to the Trinity River fishery restoration for the benefit of the Hoopa Valley Tribe because of their status as Indians.” SOR p 14. As support for this argument, the Tribe relies most heavily on the provisions of the CVPIA which specifically refer to the Tribe. *Supra*, p 5. The Tribe contends that the specific mention of Federal trust responsibilities to the Tribe in connection with the instream release of water, the direction to complete the Trinity Flow Study in consultation with the Tribe, and the requirement that the Tribe concur in recommendations for fishery restoration before those recommendations may be implemented, together show that the “Trinity River restoration program” is “for the benefit of the Hoopa Valley Indian Tribe.” SOR pp 15-16.

The Tribe further argues that BOR has improperly interpreted the ISDEA to mean that a program must exclusively benefit a Tribe before it falls within the scope of Title I of the ISDEA. SOR pp 22-24; Tribe’s Reply p 2. The Tribe asserts that this reading renders 25 U.S.C. § 450f(a)(1)(E) meaningless, and argues that ambiguities in the ISDEA are to be construed in favor of an Indian Tribe. Tribe’s Reply p 2; SOR p 22. According to the Tribe, those programs which “primarily” or “significantly” benefit a Tribe, or which involve a “unique, legally identifiable interest” of a Tribe, are programs “for the benefit of Indians because of their status as Indians” as that phrase is used in 25 U.S.C. § 450f(a)(1)(E). SOR pp 19, 23. The Tribe points out that BOR’s own training materials support the Tribe’s position by including within the scope of 25 U.S.C. § 450f(a)(1)(E) programs in which a tribe is identified as a primary or significant beneficiary. SOR p 23; AR p 00116.

For its part, BOR essentially argues that “because the restoration program as authorized in the [CVPIA] is designed not only to benefit the Tribe, but to also benefit a larger class of interests, it is not a program ‘for the benefit of Indians because of their status as Indians.’” BOR Response p 1. BOR asserts that a program must do more than “merely benefit” Indians; rather, it must be “created by Congress for Indians because of their unique legal status.” BOR Response p 4. BOR points out that while the Hoopa Valley Reservation borders about 12 miles of the Trinity River, the Trinity River is more than 100 miles long, and many interested parties stand to benefit from restoration of the Trinity River fishery.

Along these lines, BOR argues that because the CVPIA and the TRFWA both refer to other beneficiaries of programs to restore the Trinity River fishery, the restoration programs authorized by those statutes are not programs to “benefit Indians because of their status as Indians.” BOR Response pp 8-9. BOR further argues that when the Trinity River restoration program is viewed in the context of the entire CVPIA, it should be seen as “one of many programs, policies and management measures mandated by Congress to promote restoration of anadromous and other fisheries and the ecosystem as a whole.” BOR Response p 10. BOR asserts that the activities proposed by the Tribe fall within the scope of Title IV of the ISDEA, rather than Title I. BOR Response pp 10-13.

BURDEN OF PROOF

BOR has the burden of proof in this matter, and must “clearly demonstrat[e] the validity of the grounds for declining the contract proposal (or portion thereof).” 25 U.S.C. § 450f(e)(1).

DISCUSSION

At least three factors should be considered in determining whether a program or portion thereof is “for the benefit of Indians because of their status as Indians,” including: 1) congressional intent with regard to the beneficiaries of the program or portion thereof; 2) the actual beneficiaries of the program or portion thereof; and 3) the agency’s intent with regard to the beneficiaries of the program or portion thereof, as shown by its regulations or by how it administers the program. Analysis of these factors is set forth below, after an initial discussion of the ISDEA.

The ISDEA

The Indian Self-Determination and Education Assistance (ISDEA) was signed into law on January 4, 1975. As stated in the legislative history, the purpose of the Act was in part:

To promote maximum Indian participation in the government and education of the *Indian people*; to provide for the full participation of Indian Tribes in *programs and services conducted by the Federal Government for Indians* and to encourage the development of the human resources of the Indian people . . .

H.R. Rep. No. 93-1600 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, at 7775-76 (emphases added). Congress specifically found that prior to the Act, the “prolonged Federal domination of Indian service programs” had “denied to the Indian people an effective voice in the planning and implementation of *programs for the benefit of Indians* which are responsive to the true needs of *Indian communities*.” 25 U.S.C. § 450(a)(1) (emphases added). As later stated by Congress, the Act was “intended to assure maximum participation by Indian tribes in the planning and administration of *federal services, programs and activities for Indian communities*.” S. Rep. No. 100-274 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, at 2620 (emphasis added).

Congress declared its policy in part as “assuring maximum Indian participation in the direction of . . . *Federal services to Indian communities* so as to render such services more responsive to the needs and desires of those communities.” 25 U.S.C. § 450a(a) (emphasis added). Congress further declared its commitment to the “establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of *programs for and services to Indians* to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.” 25 U.S.C. § 450a(b) (emphasis added).

In 1988, Congress and Indian tribes, dissatisfied with the implementation of the ISDEA,

engaged in what Congress termed a “comprehensive reexamination” of the ISDEA, which resulted in passage of the Indian Self-Determination and Education Assistance Act Amendments of 1988. Pub. L. No. 100-472, 102 Stat. 2289; See S. Rep. No. 100-274 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620. It was these amendments which provided that programs or portions thereof “for the benefit of Indians because of their status as Indians” would be eligible for a Title I ISDEA contract.

In the legislative history for these amendments, Congress noted that the “Federal Government has provided services to Indians for nearly two hundred years,” but that since 1934, tribes had begun to achieve more control over “federal Indian programs.” *Id.*, at 2621. Passage of the ISDEA increased the extent of tribal control, so that in 1987, “many tribes [were] undertaking their own education, health, and job-training programs.” *Id.*, at 2622.

Of particular interest, Congress observed that:

The federal policy of Indian self-determination is premised upon the legal relationship between the United States and Indian tribal governments. The present right of Indian tribes to *govern their members and territories* flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States.

Id., at 2622 (emphasis added). Congress went on to note that a “fundamental objective of the federal policy of Indian self-determination is to increase the ability of tribal governments to plan and deliver services appropriate to the needs of *tribal members*.” *Id.*, at 2624 (emphasis added).

Congress clearly stated its intent that activities related to natural resources management could be the subject of an ISDEA contract. *Id.*, at 2644. This can specifically include programs of the Bureau of Reclamation. *Id.*, at 2642.

The key statutory language, “programs or portions thereof . . . for the benefit of Indians because of their status as Indians,” must be read in the context of the purposes and policies behind the ISDEA, as set forth above. In light of the many references to programs and services for Indians, Indian lands, Indian communities, and tribal members, it is clear that the primary goal of the ISDEA is to give Indian tribes more autonomy by enabling tribal governments to contract for “programs or portions thereof” that the federal government creates or administers for the benefit of a tribe’s lands, resources, or members. The Department of the Interior has a clear mandate to ensure that tribes are given a smooth opportunity to enter into Title I ISDEA contracts for those types of programs.

Noticeably absent from the statute and legislative history, however, is any reference to a tribe administering programs which are for the benefit of the general public or non-Indian lands, resources, or people. Therefore, this forum concludes that Congress did not intend to authorize tribes to administer such programs through Title I ISDEA contracts, even though such programs

may also be for the benefit of Indians. Had Congress so intended, it would have used some phrase other than “for the benefit of Indians because of their status as Indians.”⁷

This reading of the Act is consistent with Departmental precedent. The Interior Board of Indian Appeals (the Board) addressed a very similar question in Tanana Chiefs Conference, Inc. v. BLM, 33 IBIA 51 (1998).⁸ In Tanana, the Tanana Chief’s Conference, Inc., proposed an ISDEA contract for the purpose of recruiting, training, and operating a “hotshot” firefighting crew in Alaska. The Board found that:

[B]ecause of the unique and extensive checkerboard pattern of land ownership throughout the entire State, . . . the only logical conclusion is that Alaskan hotshot crews are operated *for the benefit of all persons and valuable resources within the State*, and that the identity of the persons and resources actually benefitted by the operation of a hotshot crew is largely accidental based upon the location of those fires to which the crew is deployed.

Tanana, supra, 33 IBIA at 52 (emphasis added). Therefore, the Board held that the operation of an Alaskan hotshot crew was not contractible under Title I of the ISDEA. Id. This was so even though fire suppression on Native lands was “for the benefit of Indians because of their status as Indians,” and Alaskan hotshot crews did at times engage in fire suppression on Native lands.

This forum’s interpretation of the term “for the benefit of Indians because of their status as Indians” also finds support in the regulations implementing the ISDEA. These regulations in part require Tribal organizations proposing to contract for services benefitting more than one Indian tribe to obtain the approval of each such tribe. 25 C.F.R. § 900.6 (definition of “Tribal organization”). The regulations do not contain a parallel provision concerning contracts for programs created or administered for the benefit of the general public or for a variety of interests, which indicates that such programs do not fall within the scope of the ISDEA.

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⁷ This forum does not consider itself bound by BOR’s training materials, which indicate that Title I applies when Indians are identified by statute or otherwise as “primary” or “significant” beneficiaries. AR p 116. The materials do not have the force and effect of law, and do not even appear to be an internal agency directive. They were written in 1977 and do not address the key phrase “for the benefit of Indians because of their status as Indians,” which was added in 1988. BOR Response Ex B.

⁸ BOR relies on a District Court opinion which approved the Board’s Decision. BOR Response Att A. However, because it is not clear that the District Court opinion may be cited as precedent, this forum relies only on the Board’s decision.

Congressional Intent with Regard to the Beneficiaries of Fishery Restoration Programs

In this case, as evidenced by the plain language of the TRDA, the TRFWA, and the CVPIA, Congress intended the fishery programs at issue to benefit all who have an interest in the recovery of the Trinity Basin fishery. The TRDA does not refer to specific beneficiaries in its language concerning restoration; therefore, Congress intended to benefit all who might have an interest in the “preservation and propagation of fish and wildlife” along the Trinity River. The TRFWA created an advisory group with numerous members, including the Tribe, but also including other interested parties and numerous governmental entities. Congress must have intended the fish and wildlife management program called for in the TRFWA to benefit, at a minimum, all of the members of the advisory group and their respective constituencies. The CVPIA specifically mentions the Tribe as a beneficiary, but in the same sentence mentions the fishery restoration goals of the TRFWA, which, as set forth above, has numerous intended beneficiaries. Nothing in BOR’s appropriations bill for fiscal year 2000, which has very general language, changes the above analysis.

It is also clear, however, that Congress granted the Tribe a great deal of authority concerning implementation of the “Trinity River Flow Evaluation Study” called for in the CVPIA – essentially giving the Tribe veto authority over the recommendations of that study. This grant of authority is clearly a recognition of the Tribe as a sovereign government which has a unique and significant interest in the Trinity River fishery. Congress must have intended that activities which are directly connected to the Tribe’s exercise of this authority are activities for the benefit of the Tribe because of its status as a tribe.

The Actual Beneficiaries of Fishery Restoration Programs

Based on the description of the proposed activities provided by the Tribe, most activities are directed toward recovery or management of the fishery as a whole. All of the proposed fish and fish habitat studies fall under this category.⁹ The apparent purpose behind these studies is to increase the knowledge of all entities responsible for managing the fishery, enabling these entities to make informed decisions which will ideally lead to an increase in the total number of available fish. Such an increase benefits all potential fishery users. This analysis also applies to the Coarse Sediment Management Plan.

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⁹ These include Hatchery Evaluation, Co-Management of Two Adult Salmonid Trapping Weirs, Chinook Scale Age Determination, Application of Coded Wire Tags to Trinity River Hatchery Chinook Salmon, Marking Trinity River Hatchery Steelhead Production, Pilot Channel Rehabilitation, Sediment Transport, Lower Trinity River Main Stem Spawning Distribution Survey, Screw-Trap Outmigrant Sampling in Trinity River at Junction City, and Recreational Creel Census. AR pp 00151-52.

On the other hand, the Trinity Flow Study EIS Joint-Lead Participation, as described by the Tribe,¹⁰ is directly connected to the Tribe's exercise of its authority under the CVPIA. Although all entities in some sense indirectly benefit from the Tribe's participation in the process, the Tribe is the direct beneficiary of this activity.

As described, Trinity River Program Technical Support & Comprehensive Fishery Co-Management appears to have some direct benefit to the Tribe and some more general benefits. To the extent this activity involves preparation of the Flow Study Record of Decision, it is directly connected to the Tribe's exercise of its authority under the CVPIA and directly benefits the Tribe. The remaining portions of this activity appear to have the same general benefit as the fish and fish habitat studies listed in footnote 9.

Comprehensive Fisheries Management and Trinity River Operations and Maintenance, as described, are broad activities which are not directly connected to the Tribe's exercise of its authority under the CVPIA. These activities are directed toward general management of the fishery, which benefits all who have an interest in recovery of the fishery.¹¹

The Agency's Intent with Regard to the Beneficiaries of Fishery Restoration

The parties have not cited to BOR regulations implementing the fishery restoration programs authorized by the TRDA, the TRFWA, or the CVPIA, and this forum is not aware of any. The Administrative Record contains scant discussion of these fishery restoration programs, including the specific activities proposed by the Tribe, or how they are administered.

Conclusion

In consideration of the above factors, this forum concludes that, with two exceptions, most of the fishery restoration activities proposed by the Tribe do not constitute "programs or portions thereof . . . for the benefit of Indians because of their status as Indians," as that language is used in 25 U.S.C. § 450f(a)(1)(E). This conclusion is based on the fact that Congress intended numerous beneficiaries for the fishery restoration programs, and on the fact that the specific activities proposed have numerous actual beneficiaries. Granting a Title I contract for most of the proposed activities would have the effect of expanding the Tribe's authority beyond governance of its own members and resources, which is not what Congress intended when it

¹⁰ BOR has not challenged the Tribe's description of its activities.

¹¹ The record contains little evidence that BOR has undertaken the analysis contemplated in 25 C.F.R. § 900.25, which concerns the identification of severable portions of a proposal that fall within the scope of Title I of the ISDEA. This decision identifies such severable portions, as set forth below.

passed the ISDEA. For example, control of fish studies¹² used to manage the fishery is a component of governing all who have an interest in the fishery.

Specifically, BOR properly declined the Tribe's proposal with regard to the following activities: Hatchery Evaluation, Co-Management of Two Adult Salmonid Trapping Weirs, Chinook Scale Age Determination, Application of Coded Wire Tags to Trinity River Hatchery Chinook Salmon, Marking Trinity River Hatchery Steelhead Production, Pilot Channel Rehabilitation, Coarse Sediment Management Plan, Sediment Transport, Lower Trinity River Main-stem Spawning Distribution Survey, Screw-Trap Outmigrant Sampling in Trinity River at Junction City, Recreational Creel Census, Comprehensive Fisheries Management, and Trinity River Operations and Maintenance. This forum recommends that BOR's decision be affirmed with regard to these activities.

However, this forum finds that BOR has not met its burden of proof with regard to Trinity Flow Study EIS Joint-Lead Participation. Because of this activity's direct connection to Congress' specific grant of authority to the Tribe, and because the Tribe is the direct beneficiary of this activity, this forum finds that this activity constitutes a portion of a program which is "for the benefit of Indians because of their status as Indians." This activity does not constitute an expansion of the Tribe's authority, because it is limited to the Tribe's own participation and is directly connected to the Tribe's exercise of the CVPIA authority granted to the Tribe by Congress. Therefore, BOR improperly declined the Tribe's proposal with regard to this activity, and this forum recommends that BOR's decision be reversed with regard to this activity.

Finally, with regard to Trinity River Program Technical Support & Comprehensive Fishery Co-Management, this forum finds that this activity is "for the benefit of Indians because of their status as Indians" to the extent it involves the completion of the Flow Study Record of Decision. The same rationale set forth in the previous paragraph applies here. BOR should approve this portion of the activity if the Tribe is willing to amend its proposal, perhaps by combining the "Record of Decision" portion of this activity with Trinity Flow Study EIS Joint-Lead Participation. See 25 C.F.R. 900.25.

This forum cannot award damages to the Tribe by ordering BOR to reimburse the Tribe for actions taken during Fiscal Year 2000. See Dailey v. Billings Area Director, Bureau of Indian Affairs, 34 IBIA 128, 129 (1999) (Board lacks authority to award damages). However, should the Tribe submit a Title I contract proposal for Fiscal Year 2001 or beyond, for those activities found by this forum to be "for the benefit of Indians because of their status as Indians," it is this forum's opinion that BOR would be precluded from declining such a proposal on the grounds set forth in 25 U.S.C. § 450f(a)(2)(E).

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¹² As set forth above, the Tribe filed the contract proposal at issue after objecting to a "termination for cause" section in prior negotiations. Supra, p 6.

The Tribe has asked this forum to find that BOR's position was not substantially justified. SOR p 28. However, this forum believes such a finding would be premature, and declines to make such a finding at this time.

This decision should not be read as in any way discounting the Tribe's substantial interest in the recovery of the Trinity River fishery. The Tribe is entitled to a very high level of participation in Trinity River fishery restoration programs. BOR appears to have recognized this in the past and should continue to do so in the future. This forum agrees with both parties that the activities proposed by the Tribe fall within the scope of Title IV of the ISDEA. BOR Response p 12; Tribe's Reply p 8.

Appeal Rights

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.165 (c). An appeal to the IBIA under 25 CFR 900.165(c) shall be filed at the following address: Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

Issued at Sacramento, California, February 8, 2001.

William E. Hammett
Administrative Law Judge